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No. 95 - 1184

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

DANIEL R. GLICKMAN,
SECRETARY OF AGRICULTURE,
Petitioner,

v.

WILEMAN BROS. & ELLIOTT, INC., et al.,
Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF OF TREEHOUSE FARMS, INC. AS AMICUS CURIAE IN SUPPORT OF THE RESPONDENT

TIMOTHY B. DYK
(Counsel of Record)
JOHN B. NALBANDIAN
JONES, DAY, REAVIS & POGUE
1450 G Street, N.W.
Washington, D.C. 20005
(202) 879-3939

JEFFREY A. LEVEE
JONES, DAY, REAVIS & POGUE
55 West Fifth Street
Suite 4600
Los Angeles, CA 90013-1025
(213) 243-3939

Counsel for Amicus Curiae

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INTEREST OF THE AMICUS CURIAE[1]

Amicus curiae Treehouse Farms, Inc. is a handler of California almonds. In May 1994, Treehouse filed a petition, pursuant to 7 U.S.C. § 608c(15)(a), challenging the constitutionality of the United States Department of Agriculture's marketing orders for the almond industry for the period 1987 forward. Treehouse's petition was based on its assertion that the almond marketing orders violated Treehouse's rights under the First Amendment. Treehouse's petition was filed only months after the December 1993 decision of the Ninth Circuit, in which the panel held that the almond marketing order in effect from 1980 to 1993 had violated the First Amendment rights of the handlers in that case. *Cal-Almond, Inc. v. United States Dept. of Agriculture*, 14 F.3d 429 (9th Cir. 1993).

Treehouse's petition was consolidated with petitions filed by several other almond handlers. In June 1995, following a two-week evidentiary hearing, a USDA administrative law judge ruled in favor of all of the petitioners, holding that the almond marketing orders in effect from 1987 forward violated petitioners' First Amendment rights. That decision remains on administrative appeal.

Accordingly, the result in this case could have substantial implications for the almond handlers and could affect the enforcement of the decisions issued by the Ninth Circuit in the *Cal-Almond* litigation. Indeed, there are now petitions for certiorari pending before this Court in connection with the second Ninth Circuit decision affecting the almond industry. *See United States Dept. of Agriculture v. Cal-Almond Inc.*, 65 U.S.L.W. 3002 (U.S. July 2, 1996) (No. 95-1879).

Treehouse believes that the constitutionality of the USDA's marketing orders should be evaluated under the test set forth by this Court in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980). Application of this test

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[1] Petitioners as well as respondents have consented to the filing of this brief. Their letters of consent have been filed with the Clerk under Rule 37.3(a) of this Court.

to the facts before the Ninth Circuit in *Wileman Bros.* — as well as to the somewhat unusual facts that have been presented with respect to the almond industry — compels a finding that the USDA's marketing orders have substantially infringed the First Amendment rights of the handlers. The regulations have forced handlers to contribute to generic advertising campaigns with which they disagree. These campaigns have been ineffective and are inherently incapable of meeting the objectives that they were designed to achieve on behalf of the handlers or members of their industries.

SUMMARY OF ARGUMENT

Generic commodity advertising programs promulgated under the Agricultural Marketing Agreement Act (AMAA) violate the First Amendment. Congress enacted the AMAA in the wake of the Great Depression to respond to problems brought on the by that economic crisis. Congress, however, did not authorize compelled advertising programs under the AMAA until the 1960s, and initially, only for cherries. Congress later authorized advertising for other commodities, including peaches, plums, nectarines, and almonds. With respect to all of these commodities, the legislative history and findings of the Secretary of Agriculture do not establish that compelled advertising programs are necessary for the economic health of these industries.

The First Amendment propriety of these compelled advertising programs must be assessed under this Court's decision in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980). That the current case involves a commercial speech compulsion rather than a prohibition does not change the analysis. This Court historically has applied the same constitutional scrutiny in compelled speech cases as it has in prohibition cases. Importantly, the danger presented by the compulsion in this case, paternalistic government manipulation of consumer information, is the same danger that this Court has identified with respect to commercial speech prohibitions.

The case for application of *Central Hudson* is even stronger where the government's program functionally operates like a prohibition. There is no question that the assessments in this case reduce the handlers' ability to pursue their own speech. This Court has recognized that speech may be effectively prohibited where businesses with limited resources are subject to government speech requirements. Furthermore, the assessments in this case are unlike general taxes where revenues are funnelled into a general revenue fund. These assessments are used exclusively for the dissemination of certain messages.

The Government erroneously claims that *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977) and *Keller v. State Bar of California*, 496 U.S. 1 (1990) establish that these regulations are to be judged by a lax "germaneness" test. In those cases, there was no argument that the regulations operated effectively to prohibit speech. In addition, the government in those cases did not determine the content of the speech of the organization, as it does in this case. Finally, this Court has not employed the "germaneness" analysis to evaluate the constitutionality of a compelled government program but only to determine whether, on the margin, a particular activity falls within the constitutional area once the program itself has been judged constitutional.

The Government has also failed to carry its burden of proving that the regulations in this case satisfy the *Central Hudson* test. The Government's showing rests entirely on "mere speculation [and] conjecture."

The Government has attempted to justify the mandatory assessments in three ways, none of which is persuasive. The Government's claim that collective advertising will not take place absent mandatory assessments is not supported by Congressional findings or record evidence. Second, even if collective advertising were to decline absent government compulsion, the Government fails to establish that the individual advertising would not adequately serve the objective of increasing consumption. Finally, the Government's proffered concern about fairness and

free-riders is untenable in light of the fundamental unfairness that actually results from these programs.

ARGUMENT

This case presents a First Amendment challenge to government regulations compelling generic commodity advertising.[2] The Government's brief reflects two errors that are both fundamental and pervasive.

First, the Government urges that the test established by this Court in *Central Hudson* for determining the constitutionality of government regulation of commercial speech is inapplicable. It urges that the constitutionality of compelled commercial speech should instead be judged by a far lesser level of scrutiny, requiring only that the Government establish that the regulation is "germane" to a legitimate government objective.

The second error lies in the Government's contention that the compelled advertising involved here satisfies *Central Hudson*. In fact, the Government has failed to make the factual showing required by *Central Hudson* and later decisions of this Court. The Government's showing rests entirely on assumption and speculation, rather than concrete support from the legislative history, administrative proceedings, or the factual record.

I. THE HISTORY OF GOVERNMENT COMPELLED SPEECH IN THE COMMODITIES FIELD.

The statutory authorization for the generic commodity advertising programs in this case, and for programs covering numerous other commodities, is found in amendments added to the Agricultural Marketing Agreement Act of 1937 (AMAA), beginning in the early 1960's. 7 U.S.C. § 608c(6)(I).

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[2] *See, e.g.*, 7 U.S.C. § 608c(6)(I); 7 C.F.R. § 916.45 (California nectarine advertising); 7 C.F.R. § 917.39 (California peach and pear advertising); 7 C.F.R. § 981.41 (California almonds).

As the Government recognizes (Pet. Br. 3), the original 1937 Act sought to achieve price and supply stability in the farm industry during the Great Depression. The enactment was designed to address the "disruption of the orderly exchange of commodities in interstate commerce" in order to preserve "the purchasing power of farmers" and "the value of agricultural assets which support the national credit structure." 7 U.S.C. § 601.

The Secretary of Agriculture was to implement the statute by issuing marketing orders regulating certain commodities. *See* Act to Amend Agricultural Adjustment Act, ch. 641, § 5, 49 Stat. 750, 753 (1935).[3] With respect to fruits, the Secretary's powers originally encompassed, for example, the abilities to limit the quantities marketed by grade and quality of fruit, and to allot the amount fruit handlers could purchase or market. *See* 49 Stat. 755-56. Congress evidently did not believe it necessary to include provisions authorizing compulsory advertising, and did not do so.

Under 7 U.S.C. § 610(b)(2)(ii), which was added in 1947, any marketing order issued by the Secretary was to provide for assessments against fruit handlers for the pro rata share of expenses associated with that order. In 1954, paragraph (I) of § 608c(6) was added to the AMAA. This provision allowed the Secretary to establish "marketing research and development projects designed to assist, improve, or promote the marketing, distribution, and consumption" of certain commodities. Agricultural Act of 1954, ch. 1041, tit. IV, § 401(b), 68 Stat. 906. The expenses of these projects were "to be paid from funds collected pursuant to the marketing order." *Id.* However, neither

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[3] What is now 7 U.S.C. § 608c was originally enacted as an amendment to the Agricultural Adjustment Act in 1935. It was reenacted as part of the Agricultural Marketing Agreement Act of 1937. Agricultural Marketing Agreement Act of 1937, ch. 296, 50 Stat. 246 (codified as amended at 7 U.S.C. §§ 601-626).

the 1947 nor the 1954 provisions authorized the Secretary to compel paid advertising of commodities.

A provision for the first time authorizing the Secretary to compel paid advertising for cherries (but not other commodities) was added in 1962, and its genesis is instructive. Section 403 of the Food and Agriculture Act of 1962 amended 7 U.S.C. § 608c(6)(I) to provide specifically that marketing orders for cherries could include paid advertising. Pub. L. No. 87-703, tit. IV, § 403, 76 Stat. 632. The provision authorizing compulsory cherry advertising was proposed by Senator Hart from Michigan and was adopted as a floor amendment by the Senate, apparently as a concession to the cherry industry. The provision was hardly seen as a solution to a pervasive economic problem; indeed, at the time there was "real opposition to including this provision in marketing agreement legislation generally for all products." 108 Cong. Rec. 9324 (1962) (statement of Sen. Holland). The provision was adopted, however because cherries were "a relatively small product" and the industry desired "the same advantage that citrus growers have in Florida, California, and Texas by State law." *Id.*

Congress added other commodities to the statutory paid advertising clause in subsequent years. Nectarines, plums, and other commodities were included in 1965. *See* Produce-Marketing Orders—Advertising, Pub. L. No. 89-330 § 1(b) 79 Stat. 1270. Almonds were added in 1970. *See* Agriculture—Marketing Orders—Almonds, Pub. L. No. 91-522, 84 Stat. 1357. California-grown peaches were added to the statutory paid advertising provision in 1971. *See* Agriculture—Marketing Orders—California Peaches, Pub. L. No. 92-120, 85 Stat. 340. In each of these instances, the legislation was apparently responsive to the Secretary of Agriculture's views, *see* S. Rep. No. 295, 92d Cong., 1st Sess. (1971); S. Rep. No. 1204, 91st Cong., 2d Sess. (1970); H.R. Rep. No. 846, 89th Cong., 1st Sess. (1965), that "any fruit or vegetable commodity group which actively supports the development of a promotion program by [mandatory assessments] should be given an opportunity to do so." S. Rep. No. 295 (1971), *reprinted in* 1971 U.S.C.C.A.N. 1406, 1407 (California-grown peaches); *accord* S. Rep. No. 91-1204 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4780, 4782 (almonds); H.R. Rep. No. 846 (1965), *reprinted in* 1965 U.S.C.C.A.N. 4142, 4144 (nectarines, plums & others). In other words, the compelled advertising was an effort to accommodate industry demand rather than a governmental judgment that such advertising was essential.

As Congress added commodities, the Secretary issued marketing orders authorizing the advertising programs for those commodities. Compulsory advertising for California nectarines was included in an administrative marketing order from the Secretary beginning in 1966. *See* 31 Fed. Reg. 5635 & 8176 (1966); 7 C.F.R. pt. 916. Compulsory advertising for plums began in 1971. 36 Fed. Reg. 8735 & 14,381 (1971).[4] Compulsory advertising on behalf of California peaches was authorized by marketing order starting in 1976. *See* 41 Fed. Reg. 14,375 & 17,528 (1976); 7 C.F.R. pt. 917.[5]

When adopting the nectarine paid advertising authorization, the Secretary made no findings that paid advertising was essential to the continued health of the industry. Rather, the goal was to enable this product to better compete with others. He noted that "nectarines are marketed in a highly competitive situation," and compete "with a host of processed and fresh fruits, many of which are nationally advertised and promoted." 31 Fed. Reg. at 5636; *accord* 36 Fed. Reg. at 8736 (similar finding with respect to plums). Moreover, the Secretary determined that paid advertising "is needed in the [marketing] order so the [producers] committee will possess the means to strengthen the competitive

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[4] Compulsory advertising for plums ended in 1991. Pet. App. 5a n.1.

[5] According to 7 U.S.C. § 608c(6)(I), paid advertising is now authorized for "almonds, filberts (otherwise knows as hazelnuts), California-grown peaches, cherries, papayas, carrots, citrus fruits, onions, Tokay grapes, pears, dates, plums, nectarines, celery, sweet corn, limes, olives, pecans, eggs, avocados, apples, raisins, walnuts, tomatoes, or Florida-grown strawberries."

position of nectarines and to maintain or expand sales as the occasion demands." 31 Fed. Reg. at 5636. In authorizing peach paid advertising, the Secretary concluded that the authority "would place the peach and pear industries in a better position to advance the interests of growers." 41 Fed. Reg. at 14,377. The Secretary also found that the "sharing of overhead and administrative costs reduces the costs of promotional activities for each fruit." *Id.*

In each of these instances, the Secretary's approach was the same. Following the issuance of an order, a committee of producers formed pursuant to the marketing order could decide, by majority vote, to adopt a compulsory program. *See, e.g.*, 7 C.F.R. § 916.45; 7 C.F.R. § 917.39. If the producers committee voted to adopt such a program, the handlers, who had no say in whether the advertising program was adopted in the first place, were compelled to financially support the program. The content of the proposed advertising would be determined by the producers committee.

Thus, for example, the regulations regarding California-grown nectarines, found in part 916 of Title 7 of the C.F.R., provide for a body to administer the regulations called the Nectarine Administrative Committee, and it is composed of eight members appointed by the Secretary. 7 C.F.R. § 916.20. Each member must be a "grower," defined as "any person who produces nectarines for the fresh market and who has a proprietary interest therein." § 916.9. The Committee is in charge of establishing the marketing advertising programs, subject to the approval of the Secretary. § 916.45. The Committee's projects are financed by assessments paid by "handlers"; a handler is "any person (except a common or contract carrier transporting nectarines owned by another person) who handles nectarines." § 916.10. "Handle" means to "sell, consign, deliver, or transport nectarines. . . between the production area and any point outside thereof, or within the production area." § 916.11. The Committee submits a yearly budget, including amounts for advertising and a

recommendation for an assessment rate, to the Secretary for approval. § 916.31(c); § 916.62.[6]

When the Secretary adopts a budget from an administrative committee, he fixes an assessment rate on handlers to finance that budget. *See* 7 C.F.R. §§ 916.41 & 917.37. Handlers who object to the provisions of marketing orders promulgated by the Secretary may petition for a modification of the order or a specific exemption from that order, but only on the ground that the assessment is contrary to law. *See* 7 U.S.C. § 608c(15)(A).

The most recent final rule adopting an assessment rate for peach and nectarine handlers was issue by the USDA on October 5, 1995 and remained effective from March 1995 through February 1996. According to that ruling, there are about 300 handlers of nectarines and peaches in California subject to USDA marketing orders. In addition, there are about 1,800 producers of nectarines and peaches in California. 60 Fed. Reg. 52,067 (1995). The USDA accepted the Nectarine Administrative Committee's recommendation $3,683,031 for expenses for the 1995-96 fiscal year. Of this amount, $1,534,593 was allocated for "domestic market development." *Id.* at 52,068. The Peach Commodity Committee recommended a budget of $3,736,531 with $1,534,593 for "domestic market development."[7] The assessment rates approved to meet those expenses were $0.1850 per 25-pound container or equivalent of nectarines handled and $0.19 per 25-pound container or equivalent of peaches handled.

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[6] The peach, pear, and (when they were included) plum regulations are found in part 917 of title 7, and, as with nectarines, advertising and marketing project decisions, subject to the Secretary's approval, are made by a Commodity Committee, which consists of growers only. *See* 7 C.F.R. §§ 917.35 & 917.39. Each Commodity Committee submits a yearly budget, including money designated for advertising and recommended assessment, to the Secretary for approval. § 917.35(f).

[7] For both peaches and nectarines, expenses fall into one of four general categories: "administration costs, inspection services, research, and the largest of the four, advertising and promotion." Pet. App. 52a.

While it appears in the same code provision, Congressional authorization for paid advertising for almonds is slightly different than that of tree fruit. Congress included a provision that allows the Secretary to credit almond handlers for direct marketing expenditures, including paid advertising, when calculating pro rata expense assessment for those almond handlers. *See* Agriculture—Marketing Orders—Almonds, Pub. L. No. 91-522, 84 Stat. 1357. Section 608c(6)(I) also provides for possible credits for handlers of filberts, raisins, walnuts, olives, and Florida Indian River grapefruit. 7 U.S.C. § 608c(6)(I). This almond program was invalidated by the Ninth Circuit as contrary to the First Amendment.[8]

In addition to the commodities listed in § 608c(6)(I), Congress has authorized paid advertising and promotion for numerous other commodities in stand-alone legislation now found in separate sections of the Code.[9] Moreover, as part of the recent Federal

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[8] *Cal-Almond, Inc. v. United States Dept. of Agriculture*, 14 F.3d 429 (9th Cir. 1993).

In the almond situation, the credit system actually promotes unfairness. Because, as the Government acknowledges, one retailer (Blue Diamond) maintains a 90% market share and does a considerable amount of retail advertising, it can avoid major contributions to the generic campaign. *Cal-Almond*, 14 F.3d at 438-39. Most of the rest of the handlers who must contribute to the campaign sell almonds as ingredients to foreign purchasers. Thus, those handlers contribute much money to a generic advertising campaign that benefits only one retailer. *Id.* at 440 (restrictions on creditable advertising "are designed to benefit Blue Diamond, who overwhelmingly dominates the retail almond market, at the expense of smaller handlers . . . who sell primarily to ingredient manufacturers").

[9] *See, e.g.*, Soybean Promotion, Research and Consumer Information Act of 1990, Pub. L. No. 101-624, 104 Stat. 3881 (codified as amended at 7 U.S.C. §§ 6301-6311); Watermelon Research and Promotion Act of 1985, Pub. L. No. 99-198, tit. XVI, 99 Stat. 1622 (codified as amended at 7 U.S.C. §§ 4901-4916); Pork Promotion, Research and Consumer Information Act of 1985, Pub. L. No. 99-198 tit. XVI, 99 Stat. 1606 (codified at 7 U.S.C. §§ 4801-4819); Beef Promotion and Research Act of 1985, Pub. L. No. 99-198, tit. XVI, 99 Stat. 1597 (codified at 7 U.S.C. §§ 2901-2911); Egg Research and Consumer Information Act of 1974, Pub. L. No. 93-428, § 3, 88 Stat. 1171 (codified as amended at 7 U.S.C. §§ 2701-2718).

Agricultural Improvement And Reform Act of 1996 (FAIR Act), Congress enacted the "Commodity Promotion, Research, and Information Act of 1996," which grants the Secretary broad power to pursue generic advertising programs for any "agricultural commodity." *See* Pub. L. No. 104-127, tit. V, §§ 511-525, 110 Stat. 1032.[10]

II. THE PROPER FIRST AMENDMENT ANALYSIS IS THAT SPECIFIED IN *CENTRAL HUDSON GAS & ELEC. CORP. V. PUBLIC SERV. COMM'N OF N.Y.*

A. The *Central Hudson* Test Applies To Government-Compelled Commercial Speech

Beginning with its *Virginia Pharmacy* decision in 1976, and overruling long-standing precedent, this Court held that commercial speech is protected by the First Amendment. *Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council*, 425 U.S. 748, 761 (1976). In *Central Hudson*, this Court established for the first time a comprehensive test for judging the constitutionality of commercial speech restrictions that is less stringent than the test used to judge the constitutionality of non-commercial speech. This Court has thus concluded that the government "may regulate some types of commercial advertising more freely than other forms of protected speech." *44*

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[10] According to one publication: "Commodity groups tend to prefer stand-alone legislation over the AMAA of 1937 because it provides for a more informal rule making procedure and the program can be tailored more to their specific needs." O. Forker & R. Ward, *Commodity Advertising: The Economics and Measurement of Generic Programs* 82 (1993).

Liquormart v. Rhode Island, 116 S. Ct. 1495, 1505 (1996) (plurality op.); *Central Hudson*, 447 U.S. at 563.[11]

The *Central Hudson* Court outlined a four-part analysis by which government regulation of commercial speech is to be judged. First, the commercial speech must "concern lawful activity and not be misleading." 447 U.S. at 566. Next, a court must determine whether the interest that the government asserts to justify the regulation is "substantial." *Id.* Finally, a court must determine "whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest." *Id.* Significantly, with respect to these latter two inquiries, the government bears the burden of proving that the more limited regulations "would not serve adequately the State's interests." *Id.* at 570. The *Central Hudson* analysis was performed by the Court of Appeals in this case when it struck down the compelled contributions. Pet. App. 16a.

That the regulation involved here is not a traditional government prohibition on speech, *see, e.g., Rubin v. Coors Brewing Co.*, 115 S. Ct. 1585, 1587 (1995) (concerning federal labeling prohibitions), does not change the propriety of evaluating this case under the *Central Hudson* analysis.[12] This Court has noted that speech compelled by the government may be just as offensive

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[11] *But see 44 Liquormart, Inc. v. Rhode Island*, 116 S. Ct. 1495, 1518 (1996) (Thomas, J., concurring) (finding no "philosophical or historical basis for asserting that 'commercial' speech is of 'lower value' than 'noncommercial' speech"); *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 418-19 (1993) (cautioning against placing too much weight on the distinction between commercial and noncommercial speech).

[12] The fact that a government regulation, on its face, does not prohibit speech (Pet. Br. 17) is irrelevant to whether it burdens the First Amendment. *See United States v. National Treasury Employees Union*, 115 S. Ct. 1003, 1014 (1995); *Simon & Schuster, Inc. v. Members of The New York State Crime Victims Bd.*, 502 U.S. 105, 117 (1991).

as government prohibition of speech especially where, as here, such compulsion operates to displace the free flow of information.

In the context of non-commercial speech, it is well-established that the First Amendment protects not only the right to be free from government restrictions on speech, but also the right to be free from government compulsion requiring the presentation of a particular message.[13] This freedom has been protected in a wide variety of contexts. *See, e.g., Hurley v. Irish-American Gay Group Of Boston*, 115 S. Ct. 2338, 2347 (1995) (message in a parade); *Wooley v. Maynard*, 430 U.S. 705 (1977) (display of state motto on license plate); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (compelled flag salute and pledge of allegiance). This right not to speak includes the right not to fund certain speech activities with mandatory contributions. *Keller v. State Bar Of Calif.*, 496 U.S. 1 (1990) (State bar dues may not be used to fund ideological or political activities). The right to be free of government compulsion is a corollary of the right to be free from government speech restrictions. The *Wooley* Court stated that the right to speak and the right to refrain from speaking are "complementary components of the broader concept of 'individual freedom of mind.'" 430 U.S. at 714 (quoting *Barnette*, 319 U.S. at 637). Consequently, this Court has applied the same constitutional scrutiny to compelled speech cases as it has in the corresponding prohibition cases. Thus, in *Wooley*, the Court required the State to show a compelling justification for the compulsion, just as the state would be required to show a

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[13] As this Court concluded in *Riley v. National Federation of the Blind of N.C.*, 487 U.S. 781, 797 (1988) (plurality op.), "'freedom of speech' . . . necessarily compris[es] the decision of both what to say and what *not* to say." *See also Pacific Gas And Elec. Co. v. Public Utilities Comm'n Of Calif.*, 475 U.S. 1, 16 (1986) ("the choice to speak includes within it the choice of what not to say") (plurality op.); *cf. Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 256 (1974) ("Governmental restraint on publishing need not fall into familiar or traditional patterns to be subject to constitutional limitations on governmental powers.").

compelling justification for restrictions on political speech. 430 U.S. at 716; *see Pacific Gas & Elec. Co. v. Public Utilities Comm'n of Calif.*, 475 U.S. 1, 19 (1986) (plurality op.); *Barnette*, 319 U.S. at 642. So, too, in the case of commercial speech, while the overall standard is less stringent, the test should not vary depending on whether compulsion or prohibition is involved.

Compelling commercial speech presents the same dangers as prohibiting commercial speech. In each case, the government is attempting to manipulate the choices of consumers through advertising, an approach which this Court has disapproved, viewing the government's paternalistic efforts to regulate the flow of information as inherently suspect under the First Amendment. *See 44 Liquormart*, 116 S. Ct. at 1508 (plurality op.). While in the case of compelled speech the government is not cordoning off information from the public, it acts just as paternalistically in compelling speech about the products the government prefers and thinks that consumers should also prefer. As this Court stated in *Virginia Pharmacy*, the ability of consumers to make "private economic decisions" free from government manipulation of speech is of primary importance in a free enterprise economy. 425 U.S. at 765.[14]

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[14] This Court has sometimes allowed the government to require the disclosure of information in the commercial context, in order to protect consumers. *See Hurley*, 115 S. Ct. at 2347. But these cases are limited strictly to circumstances in which warnings or disclaimers are appropriate "to dissipate the possibility of consumer confusion or deception," *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985) (internal quotation omitted). The *Zauderer* Court upheld Ohio's requirement that legal advertisements contain "purely factual and uncontroversial information about the terms under which [legal] services will be available." *Id.* The first part of *Central Hudson* directly takes account of this problem.

The government program in this case is far removed from a mandatory disclosure designed to serve accurate information. The Government does not stand in the position of a regulating body attempting to prevent deception, but stands in the place of a manipulator of consumer behavior.

Moreover, the use of the *Central Hudson* test is particularly appropriate here because the government program actually operates to prohibit commercial speech. This Court has recognized the economic realities that accompany businesses with limited resources. In *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), the Court found that one of the penalties borne by newspapers who were forced by state law to publish replies from persons who were subject to negative editorials was "the cost . . . in taking up space that could be devoted to other material the newspaper may have preferred to print." *Id.* at 256. The Court stated that the "Florida statute operates as a command in the same sense as a statute or regulation forbidding [the newspaper] to publish a specified matter." *Id.* The Court recognized that it was not correct to conclude that, "as an economic reality, a newspaper can proceed to infinite expansion of its column space to accommodate the replies that a government agency determines." *Id.* at 257.

Here also, where businesses with limited advertising budgets are subject to compelled-contribution speech programs, the regulations functionally operate like prohibitions. By compelling speech, the Government effectively displaces the information that these handlers would like to provide to the public, thereby disrupting the free-flow of information to consumers that this Court has emphasized as the primary concern in the commercial speech area. *Virginia Pharmacy*, 425 U.S. at 763-64.

The Court of Appeals recognized that some larger handlers were required to contribute over $50,000 in some years - "a significant sum of money that could have been used in their own marketing efforts." Pet. App. 18a. The testimony indicated that some handlers were assessed even greater amounts. J.A. 553-54. The testimony clearly showed that the burdens caused handlers to forego advertising of their own. J.A. 567, 749.

The Government urges that this argument proves too much. According to the Government, any government tax or fee reduces the amount of funds available for marketing efforts, and under our theory any such tax would be presumptively unconstitutional. Pet. Br. 20-21. The Government's argument vastly overstates the impact of the constitutional analysis that we propose. The assessments in this case are not general taxes the funds from which are funnelled into a general revenue fund for government expenditures. These are specific assessments imposed for a particular purpose. The focused nature of the assessments distinguishes this case from other economic regulation: "where the government requires a publicly identified group to contribute to a fund earmarked for the dissemination of a particular message associated with that group, the government has directly focused its coercive power for expressive purposes." *United States v. Frame*, 885 F.2d 1119, 1132 (3d Cir. 1989), *cert. denied*, 493 U.S. 1094 (1990).

This Court similarly has distinguished generally applicable taxes from taxes focused on particular groups. In *West Lynn Creamery v. Healy*, 114 S. Ct. 2205 (1994), the Court struck down a state tax scheme designed to help Massachusetts dairy farmers. All milk sold by dealers to Massachusetts retailers was taxed, but the proceeds were distributed exclusively to in-state farmers. This Court held that the tax could not be separated from the distribution of the proceeds: "A pure subsidy funded out of general revenue ordinarily imposes no burden on interstate commerce, but merely assists local business. The pricing order in this case, however, is funded principally from taxes on the sale of milk produced in other States." *Id.* at 2212. As a result, the tax was found to discriminate against interstate commerce.

Therefore, the fact that the compelled speech program in this case does not appear, on its face, to be a speech prohibition, does not mean that it is not one in practice. It is particularly important that government regulation of commercial speech should be judged under the *Central Hudson* test if in theory or in practice it operates to prohibit speech.

B. The Government's Cases Are Inapplicable.

In place of *Central Hudson* the Government argues for a far less stringent analysis derived from the line of First Amendment cases concerning union and State bar dues. Pet. Br. 18-19. This Court has determined that the mandatory exaction of fees from non-union employees who might benefit from union collective-bargaining activities does not violate the First Amendment so long as the speech is limited to matters germane to the collective bargaining process. *Abood*, 431 U.S. at 232. This Court has also held that mandatory bar dues used to support a State bar organization's activities do not violate the First Amendment if their activities are germane to the professional activities of attorneys. *Lathrop v. Donohue*, 367 U.S. 820 (1961). However, this Court has concluded that the government may not compel contributions to support political or ideological causes not germane to the union's duties as a collective bargaining agent or the State bar's duties as regulator of the legal profession. *Abood*, 431 U.S. at 235; *Keller*, 496 U.S. at 14.

The Government now argues that the proper analysis in this case too is the "germaneness" or relevance of the subsidized activities to the government's general regulatory objectives. Pet. Br. 18; *see Abood*, 431 U.S. at 235. The Government seriously misconstrues the union and State bar dues cases.

First, there were no efforts, and no arguments, in either the union dues or bar dues cases that the effect of the regulation was to effectively prohibit speech. The amount of the mandated contributions were obviously small in amount. No credible argument could have been made that the impact of the assessments effectively prohibited the contributors from supporting other speech activities, and this Court found that they did not. *See Abood*, 431 U.S. at 230.

Second, the amount of government intrusion here is much greater than in the union and State bar dues cases. In those cases the government did not determine the content of the speech. The unions and State bars were free to pursue their speech activities without government dictation. Here, the Government, through

the operation of the commodity committees and with the final approval of the Secretary, compels the content of the speech. *See* Pet. Br. 25 n.16 (there is a "substantial degree of governmental involvement in the development and adoption of the promotional efforts"). Thus these are "[l]aws that compel speakers to utter or distribute speech bearing a particular message." *Turner Broadcasting Sys. v. FCC*, 114 S. Ct. 2445, 2459 (1994) (plurality op.).

Finally, and most fundamentally, the line of cases that apply the "germaneness" test do not use that standard to judge the constitutionality of the compelled activity, but only to judge whether a particular compelled activity is within the constitutional area.

This Court recognized in *Abood* that the very decision to allow the union shop in the first place "countenanced a significant impingement on First Amendment rights." *Ellis v. Railway Clerks*, 466 U.S. 435, 455 (1984); *Abood*, 431 U.S. at 222. According to *Ellis*, such an infringement "is justified by the governmental interest in industrial peace." 466 U.S. at 456. Once, however, the determination had been made that the union shop was allowed, the Court was left only to determine whether specific expenditures of funds were "germane" to the union's core purpose and whether the marginal infringement of First Amendment rights by the specific expenditures was enough to strike those regulations. *Id.* Not surprisingly, the *Ellis* Court found the marginal infringement of First Amendment rights by expenditures related to union conventions and publications was negligible. *Id.* With respect to the two expenditure categories that did implicate the First Amendment, the Court found that there was "little additional infringement of First Amendment rights beyond that already accepted, and none that is not justified by the governmental interests behind the union shop itself." *Id.*

Similarly in the State bar context, before the Court began analyzing the propriety of individual uses of funds with the "germaneness" analysis, *see Keller* 496 U.S. at 13, the Court analyzed whether forcing an attorney to pay dues to the State bar

in the first place violated the First Amendment, *see Lathrop* 367 U.S. at 827. In *Lathrop*, the Court held that compulsory dues payments did not violate the attorney's First Amendment rights. The Court noted that the State bar served a purpose almost wholly outside of the political arena. With respect to the plaintiff's claim that the State bar's activities resembled those of a political party, the Court stated that "on their face the purposes and the designated activities of the State Bar hardly justify this characterization." 367 U.S. at 833. Given the non-political nature of the State bar's function and the fact that a person's participation in the organization was limited only to payment of the dues, the Court rejected the First Amendment claim. *Id.* at 843.[15] The germaneness test was used later in *Keller* only to determine the outer boundaries of government authority. 496 U.S. at 13-14.

There is no issue in this case as to whether the Government acts unconstitutionally in compelling fruit producers and handlers to become members of the associations, and to contribute to the non-speech activities of those associations. Thus, the First Amendment question arises here only when the Government seeks to compel particular speech, and at that point of the analysis nothing in the union dues or bar dues cases suggests that a mere germaneness test is all that should be required. Application of the *Central Hudson* test to judge the constitutionality of the speech activities is perfectly consistent with the Court's approach to the union dues and bar dues cases, where the initial First Amendment restriction was judged by a traditional constitutional test. The corollary to that test in the commercial speech area is the test articulated in *Central Hudson*.

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[15] The plaintiff's "core" claim was that he could not constitutionally be required to give support to the State Bar. The Court expressly reserved judgment on the plaintiff's claim that his dues specifically were being used to support political activities with which he disagreed. The Court determined that the record was not sufficient to decide the question. This question was later resolved by the *Keller* Court applying the "germaneness" test. 496 U.S. at 14.

III. THE COMPELLED ADVERTISING PROGRAM IN THIS CASE IS UNCONSTITUTIONAL UNDER THE *CENTRAL HUDSON* TEST

Just as the Government has not supported its efforts to jettison the *Central Hudson* test, it has failed to show how the *Central Hudson* test has been satisfied.

As discussed earlier, this Court's decision in *Central Hudson* established a three-part test for determining whether government regulation of lawful and non-misleading commercial speech violates the First Amendment. 447 U.S. at 566. The Government must have a substantial interest to justify the regulation, the regulation must directly advance the asserted interest, and the regulation cannot be "more extensive than is necessary to serve that interest." *Id.* The final two steps of the *Central Hudson* analysis "basically involve a consideration of the 'fit' between the legislature's ends and the means chosen to accomplish those ends." *Rubin*, 115 S. Ct. at 1591 (internal quotation omitted). The Government bears the burden of proving that the speech regulations meet each part of this test. *See, e.g., Zauderer*, 471 U.S. at 647; *In re R.M.J.*, 455 U.S. 191, 203 (1982).

While this Court has made clear that the Government cannot rely on "mere speculation or conjecture" to justify a regulation on commercial speech,[16] that is all that the Government offers in this case. The Government's argument in this case is reminiscent of the State of Rhode Island's assertions in *44 Liquormart*. In that case, this Court refused to accept the State's assertion that a liquor price-advertising ban advanced the State's temperance interest: "without any findings of fact, or indeed any evidentiary support whatsoever, we cannot agree with the assertion that the

[16] *Edenfield v. Fane*, 113 S. Ct. 1792, 1800 (1993); *see Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 496 (1986) (courts "may not simply assume that [a statute] will always advance the asserted state interests sufficiently to justify its abridgement of expressive activity") (internal quotation omitted).

price advertising ban will significantly advance the State's interest in promoting temperance." 116 S. Ct. at 1509.

The most important interest that a government can assert justifying regulation on commercial advertising is the protection of the consumer.[17] The Government has not, and cannot plausibly, justify the compelled speech program in this case on the grounds that it protects the health or safety of consumers. The Government instead asserts that it has a substantial interest in enhancing the consumption of nectarines, peaches, and plums in order to preserve American agriculture, and that advertising serves this interest by increasing consumption. Pet. Br. 35. The advertising programs at issue here were not, contrary to the Government's implication, adopted as a result of the agricultural collapse during the Great Depression, but are of far more recent origin and designed to serve perceived competitive interests of the fruit producers.[18]

But, assuming *arguendo* that enhancing the consumption of the fruits at issue is a substantial government interest, this interest could justify the regulation only if the Court were willing to accept a series of tenuous propositions, which are open to serious question. Initially, the Government has not established that advertising increases consumption. With respect to the effect of advertising in general, the Court of Appeals cited this Court's decision in *Posadas* for the proposition that advertising is "presumed" to increase consumption. Pet. App. 17a. This Court's recent decision in *44 Liquormart*, however, casts doubt

[17] *See, e.g., Rubin*, 115 S. Ct. at 1591 (within the context of alcohol labeling, "Government here has a significant interest in protecting the health, safety, and welfare of its citizens").

[18] *See* Forker & Ward, *supra*, at 89-90 ("most of the large generic commodity promotion programs that now exist came about because of political pressure from the affected commodity group"); *id.* ("With few exceptions, a major commodity trade organization provides the funds and the lobbying effort to enact legislation for commodity promotion programs.").

on the viability of this presumption. The *44 Liquormart* Court was unwilling to assume that the price advertising ban on alcohol in that case would reduce significantly alcohol consumption. 116 S. Ct. at 1509 (plurality op.). The assumption that advertising increases consumption is equally open to question.

Moreover, the assumption is more complicated in this case because the advertising must increase consumption of the commodity at issue but, in order to advance the Government's interests in all of the promotion programs, not at the expense of other commodities being promoted by the Government. However, in order to believe that these Government generic advertising programs are effective for all of the commodities that the government assists, every person in America would have to have an almost infinite capacity for the consumption of fruits, vegetables, meats, dairy products, and whatever other commodity is being promoted, at the same time that the Government is encouraging consumers to avoid obesity and reduce their intake of at least some of these commodities.[19]

The Secretary himself has recognized the existence of competition among these commodities. For example, with regard to nectarines, the Secretary's written findings state, as a

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[19] Promotion programs now cover at least 39 separate food products, and all dairy products, cotton, wool, and fresh-cut flowers. Moreover, Congress recently passed the "Commodity Promotion, Research, and Information Act of 1996," as part of Federal Agricultural Improvement And Reform Act of 1996 (FAIR Act), Pub. L. No. 104-127, 110 Stat. 888, which sets the groundwork for government promotion of any "agricultural commodity." *Id.* at 110 Stat. 1033. This latter terms includes all "agricultural, horticultural, viticultural, and dairy products," as well as "livestock and the products of livestock." *Id.*

As described by one Senator, FAIR "gives broad authority to the Secretary of Agriculture to propose and implement commodity promotion programs without an initial congressional authorization." 142 Cong. Rec. S. 3070 (daily ed. March 28, 1996) (statement of Sen. Feingold).

justification for these programs, that "nectarines are marketed in a highly competitive situation. They compete for shelf space and retail advertising attention with a host of processed and fresh fruits, many of which are nationally advertised and promoted." 31 Fed. Reg. at 5636; *accord* 36 Fed. Reg. at 8736 (similar finding made with respect to plums). In fact, the Government, by purporting to help all commodities, may end up helping none of them. Even the USDA has acknowledged that "[p]er capita total food consumption is relatively constant, and advertising a given food product generally reduces demand for close substitutes." N. Powers, U.S. Dept. of Agriculture, *Agricultural Economic Report No. 629, Federal Marketing Orders for Fruits, Vegetables, Nuts and Specialty Crops*[20] (1990).

The Government's brief offers no empirical data, but only "anecdotal evidence and educated guesses," as to whether paid advertising increases the per capita consumption of the tree fruit covered by the generic advertising programs in this case. *Rubin*, 115 S. Ct. at 1593. The Government cites one study that suggests that consumers who were exposed to the advertising purchased tree fruit more "frequently" than those who did not. Pet. Br. 36. However, the Government fails to give any information on whether the peaches, pears, plums, and nectarines purchased by these Kansas City consumers in fact came from California. Furthermore, simply because a person makes more trips to the store does not mean that their net consumption of all four fruits increased. In fact, the study cited by the Government reports that "[i]n net terms, respondents reported purchasing peaches and plums less often than last year, and about the same amount of pears and nectarines." J.A. 425. The most that one USDA report could say on the effect of advertising is that

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[20] According to two commentators, this "full-stomach" argument, i.e. that commodity advertising is a "zero-sum game," has "some merit." Forker & Ward, *supra*, at 255. The only criticism of this argument that these commentators offer is that the argument ignores non-consumption benefits that might arise from the programs. *Id.* at 255-56, 259.

"[s]everal empirical studies suggest that generic advertising can temporarily boost sales." Powers, *supra*, at 20.

In any event, the Government's focus on its interest in increasing consumption merely obscures the real issue in this case. The issue is not whether the Government may suggest, encourage, or provide mechanisms for collective advertising. The issue is whether the Government has a substantial interest in *compelling* dissident fruit handlers to contribute to a mandatory advertising program. The Government urges that it does, apparently for three reasons.

First, the Government urges in the "germaneness" section of its brief (Pet. Br. 18-34) that the collective advertising program will "collapse" (Pet. Br. 27) and that the benefits of collective action "would be virtually impossible to achieve" (*id.)* absent the mandatory advertising program. Notably, the Government makes no such argument in the *Central Hudson* portion of its brief (Pet. Br. 34-48), and the reason is quite obvious. As required by *Central Hudson*, the Government is unable to find any evidence in the legislative history, the Secretary's marketing orders, or the record of this case to support any such assumption. There is no principal of classical economics which suggests that voluntary collective self-interested action by business entities is impossible to achieve. Indeed, the antitrust enforcement system is premised on the notion that such collective action is not only possible, but, in some instances, so tempting that it will be undertaken even when contrary to law.

While the legislative history of the advertising provisions suggests that advertising is beneficial and that the Government programs help to bring it about, there is no finding that mandatory participation is an essential feature. Even in the most recent legislation,[21] where the Congressional findings were written in the light of the First Amendment litigation, no such

[21] The Federal Agricultural Improvement And Reform Act of 1996 (FAIR Act), Pub. L. No. 104-127, 110 Stat. 888. *See* J.A. 754-59.

finding appears. And while those findings assert that generic commodity promotion programs further the national public interest, there is no finding that mandatory assessments are necessary to accomplish this goal.[22] The only legislative "finding" that the Government cites for this assertion is the Acting Secretary of Agriculture's 1965 letter, appearing in a House Report to the Act that authorized paid advertising for nectarines, plums and other commodities. Pet. Br. 27. That letter states: "voluntary efforts have shown that financing an advertising program is difficult without the help of State legislation or similar mediums such as under a Federal marketing order." H.R. Rep. No. 846, *reprinted in* 1965 U.S.C.C.A.N. at 4144. On its face, this letter does not say that the "benefits of collective action would be virtually impossible to achieve in the absence of mandatory assessments." Pet. Br. 27.[23]

[22] *See, e.g.*, FAIR § 501(b)(1), J.A. 755 ("It is in the national public interest and vital to the welfare of the agricultural economy of the United States to maintain and expand existing markets and develop new markets and uses for agricultural commodities through industry-funded, Government-supervised, generic commodity promotion programs established under commodity promotion laws.").

According to the legislative history of FAIR, these findings were not in the Senate or House passed bills, which were reconciled into the Act, and were not "the subject of hearings or debate in either Chamber of Congress." 142 Cong. Rec. S. 3070 (daily ed. March 28, 1996) (statement of Sen. Feingold). The findings were specifically adopted as "an effort to combat Federal court challenges to these programs[.]" *Id.*

[23] The government cites this Court's decision in *United States v. Ruzicka*, 329 U.S. 287 (1946) as support for its argument that the promotional programs in this case would "collapse" without mandatory assessments. Pet. Br. 28. *Ruzicka*, however, is inapposite. It was decided before either marketing promotions or paid advertising was authorized by Congress.

Second, the Government argues at some length that individual advertising is not as effective as collective advertising.[24] The Government complains that individual advertising "aims to give each particular advertiser a larger share of that market," (Pet. Br. 39), will not educate "regarding the maturity and proper ripening" (Pet. Br. 40), or "educate the consumer about the fruit" (*id.*). Just why the Government should care what particular advertising copy is adopted, if the desired end (increased consumption) is achieved, is never explained. The Government's objections to individual advertising approaches are in fact no more than nit-picking.

When it comes to the question whether individual advertising increases consumption, the Government is forced to admit that it does. It concedes that individual "advertising, viewed in the aggregate, no doubt increases the overall market for a commodity." Pet. Br. 39. Most tellingly, the Government virtually concedes that it cannot show that individual advertising in general would not effectively address this broad goal. It admits that "there is no way definitively to determine what form and level of advertising individual handlers would engage in absent a system of mandatory assessments." Pet. Br. 42. Elsewhere, the Government appears to admit that "the government could not meet its burden of demonstrating that its approach would prove more effective than the efforts of individual handlers." Pet. Br. 43. In essence, the Government urges that the *Central Hudson* rule of proof be abandoned in favor of a rule permitting regulation by speculation. There is no support for such a radical revising of *Central Hudson*, either in logic or experience.

Finally, the Government argues that it has a substantial interest in preventing "free riders" from unfairly benefiting from collective advertising by others in the fruit industry. Pet. Br. 35. It is plain that the "free rider" "fairness" concern is the

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[24] This argument also assumes that collective advertising would "collapse" in the absence of Government compulsion, an assumption which, we have shown, is based entirely on conjecture.

predominant asserted government interest. That this concern about free riders is the motivation behind this program is illustrated by the legislative history of the programs in this case. As noted above, paid advertising funded by mandatory assessments was authorized initially for one commodity only, cherries. That provision was sought by the cherry growers to compel fund advertising to compete with programs already existing by virtue of State law. *See* 108 Cong. Rec. 9324 (statement of Sen. Holland).

The legislative history of the 1965 legislation that added several other commodities to the paid advertising list contains more elaboration and suggests that this legislation was adopted for the convenience of certain members of the relevant commodity industries seeking to advertise collectively. According to a letter from the Acting Secretary of Agriculture, which was included in the House Report of the Bill, the Department had "not had any experience in the operation of an advertising program," but indicated that "*if the growers* of the commodities specified *believe that advertising will benefit them*, thereby tending to meet the objectives of the act, *such authority should be added to the act.*" H.R. Rep. No. 846, *reprinted in* 1965 U.S.C.C.A.N. at 4144.

According to the Government it is "only fair that these handlers pay their pro rata share." Pet. Br. 48.[25] However, we have a real doubt as to whether this interest in "fairness" is a substantial government interest within the meaning of *Central Hudson*. Certainly no prior decision of this Court cited by the Government suggests that it is. But even on the assumption that it is, the Government regulation fails to achieve the "fairness" that is seeks. The producers of these commodities are not compelled to contribute a cent to the compelled advertising program. *See* Pet. Br. 25 n.16 ("although the assessments are

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[25] *Accord* Pet. Br. 17 (program "fairly allocates" the burdens of participation); Pet. Br. 26 ("[i]t is only fair that the participants in that market pay their pro rata share"); Pet. Br. 27 (without mandatory assessments certain individuals "would unfairly benefit").

levied against the handlers of the fruits, the marketing orders are designed in large measure for the benefit of the producers (farmers)"). Moreover, retailers also benefit from these programs without contributing.

So too, as the Court of Appeals in this case recognized, not all geographic regions are compelled to support the program. California is the only state where handlers are subject to these assessments even though there are thirty-three other states that commercially handle peaches and twenty-eight that handle nectarines. Pet. App. 21a. The Secretary found, with respect to nectarines, that "it is not widely produced in the United States," implying that there are significant numbers of foreign nectarines on the market. 31 Fed. Reg. at 5636. Thus, potentially, both out-of-state and foreign fruit handlers and producers may free ride on the advertising programs in this case. And in each instance, handlers of non-California fruit or handlers of foreign fruit are not asked to contribute. The testimony suggested that consumers are not aware of the origin of the fruit that they are buying. J.A. 653, 675.

In addition, the "fairness" justification is undercut by the existence of statutory exemptions for some participants in other programs. For example, the egg promotion program has a statutory exemption for egg producers who do not have over "75,000 laying hens." 7 U.S.C. § 2711(a). Significantly, with respect to this free rider "problem," Congress was not only aware of the situation, but acknowledged that the exemption was adopted precisely because it would create free riders. *See* S. Rep. No. 1109, 93d Congress 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 5418, 5419 (program designed so that small producers would benefit even though exempt from contributing); *see also* 7 U.S.C. § 6802(4) (cut-flower program exemption); 7 U.S.C. § 6102(11) (mushroom program exemption).

The almond situation presents a particularly egregious example of the unfairness and free-riding that these generic programs actually create. As the Government concedes in its brief, one retailer has approximately 90% of the domestic retail almond

market. Pet. Br. 47 & n.25. Other handlers do business by selling almonds as ingredients and overseas. *See, e.g., Cal-Almond*, 14 F.3d at 438 (Cal-Almond exports approximately 90 percent of its almonds for use as ingredient items). However, these latter handlers must pay assessments to promote the generic retail domestic marketing of almonds. Such advertising, if beneficial at all,[26] greatly benefits the one dominant domestic retailer but does not benefit ingredient sellers at all. *Cal-Almond*, 14 F.3d at 440.

The regulation here simply does not achieve the fairness which is its goal, and fails to directly advance the Government's goal as required by *Central Hudson*.

For all these reasons, the Government has (in some cases by its own admission) failed to bring forth proof that compelled advertising directly advances a substantial government interest and is not more extensive than necessary, proof which is essential to sustain the regulations under the First Amendment.

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[26] The *Cal-Almond* court noted that the USDA has presented "little or no evidence regarding the effectiveness of the Board's promotional efforts," and thus failed to show that the creditable advertising program directly advanced a substantial government interest. *Id.* at 438. The court, in fact, concluded that "most of the evidence in the record indicates that the regulations *hinder* the handlers' efforts to increase sales and returns to growers." *Id.*

CONCLUSION

For the foregoing reasons the decision of the court of appeals should be affirmed.

Respectfully submitted,

TIMOTHY B. DYK
(*Counsel of Record*)
JOHN B. NALBANDIAN
JONES, DAY, REAVIS & POGUE
1450 G Street, N.W.
Washington, D.C. 20005
(202) 879-3939

JEFFREY A. LEVEE
JONES, DAY, REAVIS & POGUE
55 West Fifth Street
Suite 4600
Los Angeles, CA 90013
(213) 243-3939

Counsel for Amicus Curiae

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